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Before the  
Federal Communications Commission  
Washington, D.C. 20554

## MM Docket No. 93-91

In the Matter of

Amendment of Section 73.202(b), RM-8197  
Table of Allotments, RM-8279  
FM Broadcast Stations.  
(Berlin, De Forest, Markesan  
and Wautoma, Wisconsin)<sup>1</sup>

**REPORT AND ORDER**  
**(Proceeding Terminated)**

Adopted: July 12, 1995;

Released: July 19, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 8 FCC Rcd 2747 (1993), proposing the allotment of Channel 226A to De Forest, Wisconsin, as that community's first local transmission service. The *Notice* was issued in response to a petition filed by De Forest Broadcasting Company ("petitioner"). To accommodate the allotment at De Forest, petitioner also requested the substitution of Channel 272A for Channel 226A at Wautoma, Wisconsin and substitution of Channel 284A for Channel 272A at Berlin, Wisconsin. Petitioner filed comments restating its interest in Channel 226A at De Forest. Mark J. Kasten d/b/a Markesan Broadcasting Company ("MBC") and Wautoma Radio Company ("WRC") filed counterproposals.<sup>2</sup> Kingsley H. Murphy, Jr. ("Murphy") and MBC filed reply comments. Late-filed comments were received from petitioner, MBC and Murphy.<sup>3</sup>

2. MBC counterproposed the allotment of Channel 284A to Markesan, Wisconsin. According to MBC, the requested allotment would provide a first local service to Markesan, a community of 1,519 people. MBC has stated its intention to construct and operate a commercial broadcast station in Markesan if its counterproposal is granted.

3. Murphy, licensee of Station WISS-FM, Berlin, Wisconsin, filed comments in response to the *Notice*. Murphy notes that although petitioner made an initial commitment to reimburse Station WISS-FM for its frequency-changing expenses in the event it is the ultimate permittee of Channel 226A at De Forest, it neglected to do so in comments. Murphy considers this omission to be a very serious matter and urges that petitioner's proposal be denied unless it restates its reimbursement commitment. Murphy points out that the timing of a frequency change for an operating station is a more complex matter than usual, where as here, there is the potential for a comparative broadcast proceeding to select a permittee at De Forest. It could take years before a construction permit is actually issued for the channel at De Forest. For these reasons, Murphy urges that if a frequency change at Berlin is ordered, the order should not contain the usual requirement to submit an application within 90 days of the effective date of the order. Rather, Murphy contends that he should not be required to file any modification application until 90 days after the selection of a permittee for Channel 226A at De Forest becomes final and Murphy receives a reimbursement commitment from the permittee.

4. Murphy, in reply comments, states his support of the allotment of a channel at De Forest and proposed substitutions at Berlin and Wautoma. Murphy indicates that the substitution will permit Station WISS-FM to seek a six kilowatt class A upgrade which is not feasible on its current channel. Murphy objects to the counterproposals filed in this proceeding and requests that they be dismissed and the FM Table of Allotments be amended as proposed in the *Notice*.

5. In reply, MBC asserts that an allotment at Markesan would provide a first aural service to approximately 2,000 persons in some 72 square miles, and a second aural service would be provided to approximately 3,300 persons. Further, the community of Markesan is underserved as it presently receives only one reception service from Station WPKR(FM), Omro, Wisconsin. MBC states that Markesan

<sup>1</sup> The community of Markesan has been added to the caption.

<sup>2</sup> Public notice of the counterproposal filed by Markesan Broadcasting Company was given on June 30, 1993 (Report No. 1949). WRC's counterproposal is unacceptable for consideration and therefore was not placed on public notice. Although the *Notice* considers WRC as an applicant, we note that on June 11, 1993, the same date counterproposals were due in this proceeding, the Commission granted WRC a construction permit, which enables it to request an upgrade. WRC proposed the substitution of Channel 226C3 for Channel 226A at Wautoma, Wisconsin, denial of an allotment at De Forest, Wisconsin and no change at Berlin, Wisconsin. Channel 226C3, at WRC's proposed site 43-59-25 and 89-11-40, is short spaced to a construction permit for Station KFKQ, Channel 225A, New Holstein, Wisconsin. Although WRC provided a letter from Frederick W. Kinlow, proprietor of Station KFKQ, indicating it would consent to relocate its transmitter and seek authorization under Section 73.215 of the Commission's Rules, to accommodate the Wautoma Channel 226C3 proposal, WRC failed to include a technical showing demonstrating a site exists for Channel 225A at New Holstein that complies with the Commission's mini-

mum distance separation requirements. This information permits all parties the opportunity to fully respond and permits the Commission staff to determine compliance with the Commission's spacing requirements. The counterproposal is dependent on Station KFKQ relocating its facility. The Commission has previously stated that counterproposals must be technically correct and substantially complete when filed to afford all parties an opportunity to fully respond in reply comments. See *Eldorado and Lawton, OK*, 5 FCC Rcd 6737 (1990), and cases cited therein. Even if the counterproposal had been accepted, we note that in a comparative situation such as this one, a first local service (De Forest or Markesan) is preferred over an upgrade (Wautoma). *Andalusia, Alabama*, 49 Fed. Reg. 32201, published August 13, 1984, states our policy that a modification of a license to a superior channel does not provide as great a public interest benefit as that of a new primary service.

<sup>3</sup> The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period. Therefore, in accordance with Section 1.415(d) of the Commission's Rules, we shall not accept the unauthorized pleadings.

is an ideal community for a new FM allotment as it has a population of 1,519, is incorporated with numerous retail establishments and provides an array of professional services for its residents. Markesan has its own local government, fire and police departments and a library. MBC contends that Markesan is more deserving than De Forest of a new allotment because it is a more isolated community, has fewer reception services and will provide a first and second full-time aural service in the area.

6. We have before us two mutually exclusive rulemaking proposals. In an effort to accommodate both proposals, the staff performed a search to determine if an alternate channel was available to provide service to both communities. The study indicates there are no other channels meeting the spacing requirements. Therefore, our decision in this proceeding is guided by the allotment priorities as set forth in *Revision of the FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1986).<sup>4</sup>

7. The allotment of Channel 226A to De Forest or Channel 284A to Markesan would provide a first local service to either community, fulfilling priority (3). Contrary to MBC's statement that the allotment at Markesan would provide a first and second aural service, our engineering analysis indicates that neither allotment will provide any first or second aural service. Therefore, our decision must be based on priority (4) - other public interest factors. In this regard, we find that the community of De Forest has a larger population (4,882) than Markesan (1,496).<sup>5</sup> We also find that the smaller community of Markesan receives service from 4 FM stations and 4 AM stations and is, therefore, considered to be well served.<sup>6</sup> De Forest receives service from 13 FM signals and 5 AM signals. Although De Forest is located closer to the larger community of Madison, Wisconsin, neither community is underserved as to reception services. While De Forest and Markesan are both incorporated, have their own post office and zip code, there is a considerable difference in the populations. Thus, we believe that the public interest would be best served by allotting Channel 226A to De Forest since it has the larger population. See *Clarksville and Lanesville, Indiana*, 4 FCC Rcd 4968 (1989); *Roswell, Georgia*, 2 FCC Rcd 2775 (1987).

8. Channel 226A can be allotted to De Forest, Wisconsin, in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 272A is substituted for Channel 226A at Wautoma, Wisconsin, and Channel 284A is substituted for Channel 272A at Berlin, Wisconsin.<sup>7</sup> There is a site restriction 1.9 kilometers (1.2 miles) north of De Forest to prevent a short spacing to Station KATF, Channel 225C1, Dubuque, Iowa. Wautoma Radio Company is the sole applicant for Channel 226A at Wautoma, Wisconsin (File No. BPH-880421NZ).<sup>8</sup> The substitution at Wautoma can be made in compliance with the Commission's spacing requirements at the applicant's current site. The applicant for Channel 226A at Wautoma will be permitted to amend its applica-

tion to specify the new Class A channel and retain its cut-off protection. Station WISS-FM, Berlin, operates on Channel 272A. Channel 284A can be substituted for Channel 272A at Berlin, Wisconsin, in compliance with the Commission's spacing requirements at the current site for Station WISS-FM.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 5, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Berlin, Wisconsin	284A
De Forest, Wisconsin	226A
Wautoma, Wisconsin	272A

10. Pursuant to Commission policy, reimbursement of Station WISS-FM, Berlin, by the ultimate permittee of Channel 226A at De Forest, Wisconsin, for the reasonable costs of changing its frequency will be required and governed by *Circleville, Ohio*, 8 FCC Rcd 159, 163 (1967). Once a permit has been granted, we expect parties to negotiate in good faith, subject to Commission review in the event of disagreement. See *Mayfield and Wickliff, Kentucky*, 48 RR 2d 1232 (1981). Finally, we note that Station WISS-FM need not take steps to change frequency until it is assured that it will receive payment. See *Churchville and Luray, Virginia*, 5 FCC Rcd 1106 (1990), *recon. denied*, 6 FCC Rcd 1313 (1991).

11. IT IS FURTHER ORDERED, That the Secretary of the Commission, Shall Send by Certified Mail, Return Receipt Requested a copy of this Order to the following:

Howard J. Braun Jerald L. Jacobs Rosenman & Colin 1300 - 19th Street, N.W. Suite 200 Washington, D.C. 20036 (Counsel for Kingsley H. Murphy, Jr.)	Wautoma Radio Company 981 Howard Street Green Bay, Wisconsin 54303  Markesan Broadcasting Company P.O. Box 82 Brandon, Wisconsin 53919
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12. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the License of Station WISS-FM, Berlin, Wisconsin, IS MODIFIED, to specify operation on Channel 284A, subject to the following conditions:

<sup>4</sup> (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) other public interest matters. [Co-equal weight given to priorities (2) and (3)].

<sup>5</sup> All population figures are taken from the 1990 Census.

<sup>6</sup> The community of Markesan receives service from Stations WOLX, Baraboo, WI, WTCX, Ripon, WI, WPKR, Omro, WI, WISS, Berlin, WI, WISN(AM), Milwaukee, WI, WHA(AM), WIBH(AM), and WTSO(AM), Madison, WI.

<sup>7</sup> d The coordinates for Channel 226A at De Forest are 43-16-08

and 89-20-09. The coordinates for Channel 272A at Wautoma are 44-04-18 and 89-17-30. The coordinates for Channel 284A at Berlin are 43-56-55 and 88-59-09.

<sup>8</sup> On June 11, 1993, Wautoma Radio Company was granted a construction permit for Channel 226A at Wautoma, conditioned on the outcome of this proceeding. Therefore, permittee is not entitled to reimbursement. See *Pacific Grove and Soledad, California*, MM Docket 90-17, 5 FCC Rcd 6700 (1990).

(a) Nothing contained herein shall be construed as authorizing any change in License BMPH-900209KA except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BMPH-900209KA, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

13. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the construction permit for Station WAEI, Wautoma, Wisconsin, IS MODIFIED, to specify operation on Channel 272A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Permit BPH-880421NZ except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with Permit BPH-880421NZ, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

14. The window period for filing applications for Channel 226A at De Forest, Wisconsin will open on **September 5, 1995**, and close on **October 6, 1995**.

15. IT IS FURTHER ORDERED, That the counter-proposal filed by Markesan Broadcasting (RM-8279) IS DISMISSED.

16. IT IS FURTHER ORDERED, That the counter-proposal filed by Wautoma Radio Company, IS DENIED.

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau